

**FORM FOR USE IN APPLICATIONS
FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254**

RECEIVED

2006 MAY -8 A 9:36

WILLIE L. GARDNER
Name

CLERK OF DISTRICT COURT
MONTGOMERY, ALABAMA

AIS#231984
Prison Number

William E. Donaldson Correctional Facility
Place of Confinement

United States District Court MONTGOMERY District of ALABAMA

Case No. 2:06cv413-WHA
(To be supplied by Clerk of U. S. District Court)

WILLIE LIZZIE GARDNER, PETITIONER
(Full Name) (Include name under which you were convicted)

KENNETH JONES, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person
having custody of Petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF ALABAMA, TROY KING
, ADDITIONAL RESPONDENT.

(if petitioner is attacking a judgement which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

**PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN
STATE CUSTODY**

INSTRUCTIONS--READ CAREFULLY

- (1) This petition must be legibly handwritten or typewritten and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

The Judicial Conference of the United States has adopted, effective 1/1/83, the 8½ x 11 inch paper size standard for use throughout the federal judiciary and directed the elimination of the use of legal size paper. All pleadings, etc. filed after 12/31/82 must be on 8½ x 11 inch paper, otherwise we cannot accept them.

- (2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) Upon receipt of a fee of \$5 your petition will be filed if it is in proper order.
- (4) If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.
- (6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.
- (7) When the petition is fully completed, the original and two copies * must be mailed to the Clerk of the United States District Court whose address is:

P.O. Box 711
Montgomery, Alabama 36101

- (8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

***If you are proceeding in forma pauperis, only the original petition needs to be filed with the Court.**

PETITION

1. Name and location of court which entered the judgment of conviction under attack Montgomery County Court, 251 S. Lawrence St. 36104
2. Date of judgment of conviction Oct. 28, 2003
3. Length of sentence LOWP Sentencing Judge William A. Shashy

4. Nature of offense or offenses for which you were convicted: Capital Murder, Attempted Murder, and Robbery.

5. What was your plea? (check one)

(a) Not guilty ()

(b) Guilty (x)

(c) Nolo contendere ()

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

6. Kind of trial: (Check one)

(a) Jury (x) pursuant to 13A-5-43

(b) Judge only ()

7. Did you testify at the trial? Yes () No (x)

8. Did you appeal from the judgment of conviction? Yes () No (x)

9. If you did appeal, answer the following:

(a) Name of court _____

(b) Result _____

(c) Date of result _____

If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes (x) No ()

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of court Montgomery County Circuit Court

(2) Nature of proceeding Rule 32 Petition

(3) Grounds raised The Trial Court lacked subject matter jurisdiction to impose the conviction and sentence, Conviction obtained by a violation of the protection against double jeopardy, and Trial counsel was ineffective in the plead bargaining process in giving the petitioner faulty legal advice prior to entering the plead which was in-correct.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No (x)

(5) Result DENIED

(6) Date of result 15th Nov., 2004

(b) As to any second petition, application or motion give the same information:

(1) Name of court N/A

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No ()

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of Court N/A

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No ()

(5) Result _____

(6) Date of result _____

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes (xx) No ()

(2) Second petition, etc. Yes () No ()

(3) Third petition, etc. Yes () No ()

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: The Montgomery Circuit Court Lacked subject matter jurisdiction 'according to state law' in conviction of petitioner....con.

Supporting FACTS (tell your story briefly without citing cases or law):
The Montgomery County District Attorney failed to allege the aver-
ments of capital murder in adherence to the principle of law that
all the essential elements must be allege that constitute murder
as enacted by the Alabama Legislature; where the question presented
to the Alabama Courts was, "IS THE CHARGING INSTRUMENT "THE INDICT
MENT" FATALLY DEFECTIVE FOR FAILURE TO ALLEGE THAT PETITIONER INTENT
IONALLY CAUSED THE DEATH OF ANOTHER PERSON? YES!"

Your Petitioner alleges that the Alabama Legislature in spelling
out the charge of murder, made the language of 13A-6-2(a)(1) essential
and must in haec verba be expressed in the charging instrument. The
Alabama Courts since the legislature enacted 13A-6-2(a)(1) has never
interpreted the legislative intent as to derive at what are the ele-
ments that must appear in the indictment as to the murder component
of Capital Murder in ALABAMA.

B. Ground two: CONVICTION OBTAINED BY A VIOLATION OF THE PROTECTION
AGAINST DOUBLE JEOPARDY!

Supporting FACTS (tell your story briefly without citing cases or law):
Your Petitioner entered a plead of guilty to Capital Murder
Count 1, and Robbery Count IV, and Attempted Murder Count III.

The facts of the case and the colloquy of Capital Murder
Proceedings §13A-5-43, does not and cannot support a conviction
of Capital Murder, and Robbery being that Petitioner it alleged
to have been the accomplice to the Murder/Robbery of the Premium
Package Store, to which Travis Benefield and Ray Davis were
employees at the time of the offense. The facts are that there
was only one robbery to which Travis Benefield was killed and
and Ray Davis allegedly shot during the course of said robbery;
Your Petitioner avers that the acts of accomplishing the robbery
or the force used on Ray Davis would not constitute a separate
or robbery offense from the underlying robbery which is the
aggravating circumstance of 13A-5-40(a)(2) Ala.Code 1975.

C. Ground three: PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE
OF COUNSEL IN THE PLEAD BARGAINING PROCESS.

Supporting FACTS (tell your story briefly without citing cases or law):
The trial counsel failed to explain the law to his client at
the plead bargaining process that he could make an informed
decision prior to entering the plead of guilty.

The trial counsel failed to provide the petitioner with
correct legal advice making him aware of his options in pleading
guilty.

Counsel gave his client the ultimatum of either pleading
guilty or go to trial and get convicted and receive the death
penalty.

continuation of **Ground one**.

for an offense not contained in the indictment omitting essential elements of murder as enacted by Alabama legislature.

D. Ground four: _____

Supporting FACTS (tell your story briefly without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal state briefly what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court, wither state or federal, as to the judgment under attack? Yes () No (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing N/A

(b) At arraignment and plea David Eugene Belser, 400 S.Union Street Ste. 395, Montgomery, Ala. 36104-4337

(c) At trial same as above

(d) At sentencing same as above

(e) On appeal NO APPEAL

(f) In any post-conviction proceeding _____ N/A _____

(g) On appeal from any adverse ruling in a post-conviction proceeding: _____
N/A _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes (xx) No ()

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes () No (x)

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes () No ()

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on 24th day April 2006
(date)

Willie L. Gordon
Signature of Petitioner